

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**CRIMINAL APPEAL No. 542 of 1997****For Approval and Signature:****HONOURABLE MR.JUSTICE R.P.DHOLAKIA****HONOURABLE MS.JUSTICE H.N.DEVANI**

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- 1 Whether Reporters of Local Papers may be allowed to see the judgment ?
 - 2 To be referred to the Reporter or not ?
 - 3 Whether their Lordships wish to see the fair copy of the judgment ?
 - 4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
 - 5 Whether it is to be circulated to the civil judge?

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ANWARKHAN @ ANUBHAI ISMAILBHAI GHANCHI - Appellant(s)
Versus
STATE OF GUJARAT & 1 - Opponent(s)

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Appearance :

MR PK SHUKLA for Appellant(s) : 1
 MR JM PANCHAL for Appellant(s) : 2-3
 MS ML SHAH, APP for Opponent(s) : 1

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CORAM : HONOURABLE MR.JUSTICE R.P.DHOLAKIA**and****HONOURABLE MS.JUSTICE H.N.DEVANI****Date : 31/08/2007****CAV JUDGMENT****(Per : HONOURABLE MR.JUSTICE R.P.DHOLAKIA)**

1.This appeal under Sec.374 of the Code of Criminal Procedure ('the Code' for short) has

been filed by the appellants-original accused Nos.1,2 and 3 being aggrieved and dissatisfied with the judgment and order dated 9-5-1997 passed by the learned Addl. Sessions Judge, Banaskantha at Palanpur in Sessions Case No.146 of 1994 whereby the appellants have been convicted and sentenced to undergo life imprisonment and to pay fine of Rs.500/-, in default, to suffer further three months RI for the offence under Section 302 read with Section 114 of IPC and also to undergo rigorous imprisonment for two years and to pay fine of Rs.300/-, in default, to suffer further two months rigorous imprisonment for the offence under Section 328 of IPC.

2.As per the prosecution case, on 18-5-1994, the complainant, Dilwarikhan Khanmohmed Baloch had gone to see a magic show at Radhanpur Highway Cross Roads in the evening. When the show was over, he went to the nearby hotels for the purpose of drinking tea, at that time, there was some commotion. So, he also went there and saw that Ganchi Ibrahim, Ganchi Anwarbhai @ Anubhai and Sindhi Tarmohmed Hussain of Radhanpur i.e the appellants herein, were delivering fist blows on his brother Shobhekhan (hereinafter referred to as 'the deceased') due to which, his brother fell down. Thereupon, Ibrahim was

inflicting blows on the head of the deceased with a hockey stick, Anubhai was punching him with a stick on his abdomen and Tarmohmed was inflicting stick blows on his legs. Mohmadkhan Budhekhan and Kamalkhan Alarakha were also present there and three of them rescued Shobhekhan and took him home in a rickshaw belonging to Harijan Mafabhai. While they were returning home, they had asked the deceased as to what had happened and he had replied that he owed a sum of Rs.200/- to Anwarkhan towards pan-bidi and as he did not have the said amount, all the three accused had assaulted him. Tarmohmed had caught hold of his hair and Anubhai had forced him to consume liquor. Ibrahimbhai Ishubhai had inflicted hockey blows on his head, Anwarbhai had punched him on the stomach with a stick and Tarmohmed had inflicted stick blows on his legs.

3. After going home, he had narrated the incident to his mother, sister-in-law, brother and uncle. Thereafter his uncle Anwarkhan Dilawarkhan and some relatives had taken the deceased to the Radhanpur Police Station where the PSO issued a yadi(Ex.34) to the Radhanpur Medical Officer and registered Janva Jog Entry No.2 dated 19-5-1994 at 2.15 hours in the Station Diary (Ex.47). The deceased was then taken to the Referral

Hospital at Radhanpur. Subsequently, the complainant's uncle had come to call the complainant for the purpose of lodging complaint and they had gone to the Radhanpur Police Station where the complaint (Exh.16) was recorded in the presence of Ramubhai Talsing Waghela, PSO Radhanpur Police Station and was registered as Radhanpur Police Station I.C.R.No.57/94 for the offences punishable under Sections 328, 323, 504 and 114 of the Indian Penal Code and Section 135 of the Bombay Police Act. After lodging the complaint, they went to the Referral Hospital. The Medical Officer at the Referral Hospital, Dr.Rajendrakumar Surajmal Gupta had examined the deceased and as the deceased was having head injuries, he immediately referred him to the Civil Hospital at Ahmedabad. The complainant, his mother Piraniben, his uncle Anwarkhan, neighbour Fakir Mohmed and others took the deceased to the Civil Hospital at Ahmedabad in a tempo. He was admitted in the Civil Hospital and remained there for about four to five hours and was then taken to the Rajasthan Hospital at Shahibaug in the afternoon where he expired between 1.30 and 2.00 p.m. The dead body of the deceased was then brought back to the Civil Hospital where the postmortem was performed. Thereafter, the clothes of the deceased were handed over to

them by the hospital authorities and they had returned back with the dead body and performed the last rites of the deceased.

4. After recording the FIR, Shri Ramubha Talsing Waghela, PSO, Radhanpur Police Station, took charge of the investigation and drew the panchnama of the scene of offence (Ex.26) in presence of panchas. He thereafter recorded the statements of Anwarkhan Aliyarkhan, Kamalkhan Alarakha, Velabhai and Mehboob Budhekhan. Meanwhile, he received a wireless message that Shobhekhan has expired. Thereafter, on the same day, he submitted a report for addition of Section 302 of the Indian Penal Code.

5. The investigation was thereafter handed over to PSI, Shri B.D.Wadhiya. After taking charge of the investigation, on 20-5-1994, Shri Wadhiya recorded statements of other witnesses including further statement of the complainant. Thereafter, on the same day, the accused Nos.1 and 2 were produced at the Police Station where he drew panchnama of their physical condition as well as of the weapons produced by them (Ex.49) between 11.00 and 11.30 hours in the presence of panchas. Accused No.3 Tarmohmed was produced at 16.30 to 17.00 hours and a panchnama of his physical condition as well as the weapon-stick produced by him (ex.21) was drawn in

the presence of panchas. On 21-5-1994, he recorded statements of other witnesses. The investigating officer thereafter obtained a certificate on the preliminary treatment given to the deceased at Radhanpur Hospital (ex.34). The complainant handed over the blood stained clothes of the deceased in the presence of two panchas and panchnama (ex.31) was drawn accordingly. The investigating officer thereafter obtained Marnotar Form, post mortem report etc. and kept them in the investigation file. Upon conclusion of the investigation, charge sheet has been submitted into Court of concerned learned Judicial Magistrate (First Class), Radhanpur and the same was registered as Criminal Case No.1019 of 1994.

6.As the case being exclusively triable by the Court of Sessions, learned Judicial Magistrate (First Class), Radhanpur, by his order dated 29th July, 1994 committed the Criminal Case No.1019 of 1994 to the Court of Sessions at Palanpur where it was numbered as Sessions Case No.146 of 1994 and was transferred into the Court of learned Addl. Sessions Judge, Banaskantha at Palanpur, for disposing the same on merits. The learned Judge framed charge against the accused. The accused pleaded not guilty to the charge and prayed for trial.

7.To prove the charge against the accused, prosecution examined the following witnesses:

1) Dilaverkhan Khanmahmad Baloch, P.W.1, Ex.15, an eye witness and brother of the deceased Shobhekhan.

2) Narottambhai Poonamchand Parmar, P.W.2, Ex.20, panch witness of production of weapon by accused Tarmohmed Hussainbhai. He was turned hostile.

3) Mohmedkhan Budhekhan Makrani, P.W.3, Ex.23, an eye witness.

4) Kamalkhan Alarakha Baloch, P.W.4, Ex.24, also another eye witness.

5) Ismailbhai Noormohmedbhai Baloch, P.W.5, Ex.25, also an eye witness.

6) Rustombhai Rasulbhai Ganchi, P.W.6, Ex.30, panch of panchnamas of scene of offence and also clothes of the deceased.

7) Dr.Rajendrakumar Surajmal Gupta, P.W.7, Ex.32, Medical Officer at Radhanpur Community Health Centre.

8) Dr.Vinayakrao Vasudevrao Patil, P.W.8, Ex.38, who conducted postmortem on the dead body of the deceased.

9) Ramubha Talsing Waghela, P.W.9, Ex.46, PSO, Radhanpur Police Station, who issued yadi Ex.34 to Medical Officer, Radhanpur Community Health Centre for examining

deceased.

10) Bavanji Danabhai Wadhiya, P.W.10 Ex.48, PSI, Radhanpur, who took charge of investigation from Head Constable Ramubha.

11) Keshavlal Bhemabhai Thakore, P.W.11, Ex.52, Revenue Circle Inspector.

The prosecution also placed reliance upon various documentary evidence namely, charge, Ex.5, FIR Ex.16, ticket for magic show Ex.17, panchnama Ex.21, panchnama of scene of offence Ex.26, inquest panchnama Ex.27, panchnama of clothes of deceased Ex.31, medical certificate Ex.34, opinion regarding consumption of alcohol Ex.36, result of blood test Ex.37, post mortem report Ex.39, cause of death certificate Ex.40, Station Diary entry Ex.47, panchnama of production of stick by accused Anwarkhan Ismailbhai Ganchi and hockey by Ganchi Ibrahimbhai Isamkhan Ex.49, letter to TD0 for preparation of map of scene of offence Ex.50, map Ex.51 and letter written by Mamlatdar to Circle Officer forwarding copy of panchnama of scene of offence for preparing map.

8. On submission of closing pursis by the prosecution, learned Addl. Sessions Judge recorded further statement of the accused under Sec.313 of Cr.P.C. Thereafter, after hearing the learned advocates appearing for

the respective parties, learned Addl. Sessions Judge, Banaskantha at Palanpur delivered the judgment whereby the appellants were convicted as aforesaid which is giving rise to prefer the present appeal.

9. Heard learned counsel, Mr.P.K.Shukla for the appellant No.1, Mr.J.M.Panchal for appellants Nos. 2-3 and Ms.M.L.Shah, learned APP for respondent-State.

10. It has been mainly contended by the learned counsel for the appellants that the appellants are innocent and have been falsely involved into the crime in question. According to him, there is a delay in filing the FIR. It has been further contended that no independent witness has been examined by the prosecution though available with them. It is the case of the prosecution that near the place of incident, house of Velabhai Vaghari is situated, still however, none of his family members has been examined by the prosecution. Relying upon the evidence of P.W.1-Dilawarkhan Baloch Ex.15, P.W.3-Mohmadkhan Makrani Ex.23, P.W.4-Kamalkhan Baloch Ex.24, P.W.5-Ismailbhai Baloch Ex.25, it was contended that they are either relatives or interested witnesses. As far as P.W.1, Dilawarkhan Baloch is concerned, it has been contended that he is the brother of the deceased, who initially filed the

complaint in the capacity of an eye witness wherein no allegation was made as to any weapon having possessed by any accused. However, subsequently a story is created to tally with the medical evidence to falsely implicate the accused. It is also alleged in the complaint that he saw the entire incident and tried to save his brother from beating. It is also alleged that both the accused Nos.2 and 3 were armed with sticks and inflicted blows to the victim. This is contradicted by the medical evidence mentioning only a single blow on the leg portion. According to the learned counsel for the appellants, there are contradictions and improvements in the statements of witnesses examined by the prosecution and hence, no credibility can be attached to their evidence. Therefore, conviction of the appellants based on their evidence cannot be sustained.

11.It was also contended that no motive could be established by the prosecution in this case. It is the case of prosecution that the accused No.1 demanded Rs.200/- which was outstanding from the victim and since he did not have the said amount, liquor was forcibly administered on the deceased. The said story is unbelievable and improbable in view of the fact that no injuries could be seen on the

lips, inside the mouth and around the nostril. Moreover, no marks of violence could also be seen either on the victim, accused or on their clothes. Over and above, there is no recovery of empty liquor bottle made by the prosecution from the scene of offence. The said allegation is not supported by any evidence either. Since the prosecution is unable to prove the guilt against the present appellants beyond reasonable doubt, it is requested that the appellants may be acquitted by quashing and setting aside the impugned judgment and order and they be set at liberty forthwith.

12.Learned APP, Ms.M.L.Shah, taking us through the evidence upon which reliance has been placed by the learned counsel for the appellants along with reasoned judgment and order, contended that prosecution is able to prove the case against the appellants beyond reasonable doubt. Merely because witnesses are relatives of the deceased, their evidence cannot be discarded. If Court wants to rely upon the evidence of witnesses who are relatives, Court should evaluate their evidence to find out the truth and if their evidence are found to be satisfactory and reliable, then conviction can be based on their evidence. She has relied upon the judgment of the Apex Court reported in AIR

2006 S.C. p.3010 in the case of Pulicheria Nagaraju alias Nagaraja Reddy Vs. State of Andhra Pradesh more particularly para 11 wherein it has been observed by the Apex Court as under:

“Evidence of witness cannot be discarded merely on the ground that he is either partisan or interested or closely related to the deceased, if it is otherwise found to be trustworthy and credible. It only requires scrutiny with more care and caution, so that neither the guilty escape nor the innocent wrongly convicted. If on such careful scrutiny, the evidence is found to be reliable and probable, it can be acted upon. If it is found to be improbable or suspicious, it ought to be rejected. Where the witness has a motive to falsely implicate the accused, his testimony should have corroboration in regard to material particulars before it is accepted. In the instant case nothing had been elicited in the cross-examination of eye-witnesses to discredit their evidence. Her evidence finds corroboration in complaint and the evidence of the Doctors and the Mos seized on the disclosures made by the accused. Therefore, the evidence of said

eye-witnesses could not be rejected, even though they were closely related to the deceased and inimically disposed towards the accused."

13.It has also been contended by her that apart from the evidence of relative witnesses, there are also evidence of independent persons namely, Dr.Rajendrakumar Surajmal Gupta, P.W.7, Ex.32, Medical Officer of Radhanpur Community Health Centre, who examined injured Shobhekhan and also Dr.Vinaykrao Vasudevrao Patil, P.W.8, Ex.38, who conducted post mortem on the dead body of the deceased and gave post mortem report as well as cause of death certificate. Since they are independent persons and also since nothing has come out in their cross examination shaking their evidence, their evidence are required to be accepted. Apart from that, motive is also established in this case. Hence, it is requested that the appeal is required to be dismissed.

14.We have gone through the record and proceedings as well as the reasoned judgment and order delivered by the court below. We have also given thoughtful consideration to the rival contentions raised by the learned counsel for the respective parties.

15.It is required to be noted that case of the

prosecution is centered around eye witnesses, who are four in number, supporting the say of the prosecution viz., Dilaverkhan Khanmahmad Baloch, P.W.1 Ex.15, who is the brother of the deceased Shobhekhan; Mohmedkhan Budhekhan Makrani, P.W.3 Ex.23; Kamalkhan Alarakha Baloch, P.W.4 Ex.24 and Ismailbhai Noormohmedbhai Baloch, P.W.5 Ex.25.

16.We have gone through the oral evidence including the cross examination of the above referred four eye witnesses and while going through their evidence, we have kept in mind the contentions raised by the learned counsel for the appellants that since these witnesses are from the same community, same locality and are related to each other, their evidence are required to be evaluated minutely. On a minute evaluation of their evidence, we believe that all the four witnesses are witnesses of incident. They have deposed in Court exactly the similar version which they have stated before the police and nothing contrary came out which shake their evidence.

17.As per the evidence appearing from the judgment of the court below, Dilaverkhan Khanmahmad Baloch, who is the complainant and brother of the deceased Shobhekhan, had gone to see a magic show and was returning. When he reached very near to the scene of offence, he saw the incident. He has produced and

proved counterfoil of the ticket Ex.37. Thus, presence of the complainant at the time of incident is natural and which is getting support from the documentary evidence wherein he has narrated the incident in detail. Similarly, other three witnesses have also narrated the incident in the same manner and hence, we are not repeating their evidence in detail as they support the say of the prosecution.

18. Witness Mohmedkhan Budhekhan Makrani, was also at the scene of offence as he used to take truck No.GR0-4781 as a reliever and was waiting for the truck. Kamalkhan Alarakha Baloch, who is a rickshaw driver, has also seen the incident as he was waiting for the passengers and hence, he is also an eye witness. It is this witness and others who took the victim to his house in the rickshaw. This witness has heard the oral dying declaration given by the deceased before his brother. Thus, through the evidence of this witness, prosecution has proved the oral dying declaration wherein detailed account of the incident has been narrated by the victim.

19. It is required to be noted that the accused and the witnesses are known to each other and they are from the same locality apart from the fact that they are from the same community. It is also noted that the incident

has taken place very near to the hotel. Therefore, question of misidentification may not be there at all. Looking to the way in which the incident has taken place, the evidence of witnesses are required to be believed.

20.It is true that the incident has been taken place after 12 O'clock at night wherein presence of witnesses has been established at the place of incident as being quite natural and hence, they cannot be termed as chance witnesses or got up witnesses. This aspect has been dealt with by the court below in detail in its judgment. We have gone through the same and we also share the same view.

21.It is also required to be noted that evidence of above referred four witnesses are consistent with the medical evidence of Dr.Rajendrakumar Surajmal Gupta, P.W.7, Ex.32, Medical Officer at Radhanpur Community Health Centre and Dr.Vinayakrao Vasudevrao Patil, P.W.8, Ex.38, who performed postmortem on the dead body of the deceased. Even post mortem note Ex.39 and certificate Ex.40 also support the say of the prosecution.

22.It is true that initially victim has been taken to his residence and thereafter for the purpose of treatment, he has been taken to the hospital and as advised by the doctor, he has been shifted to a hospital in Ahmedabad.

A contention has been raised by the learned counsel for the appellants before this Court as well as before the court below that while going from the scene of offence to the residence of victim, they had an opportunity to file the complaint as the Police Station is situated on the way.

23.This aspect has also been dealt with by the court below in detail. We are also of the same view that it was the prime duty of all concerned to arrange for better treatment to the victim to save his life and then to file the complaint. Still however, within 2-3 hours, complaint has been filed and it has been registered and therefore, we are unable to accept the contention raised by the learned counsel for the appellants that there is a delay in filing the complaint. According to us, there is no delay worth the name and FIR has been lodged in time. Whatever delay has been occasioned, it has been properly and satisfactorily explained by the prosecution.

24.It is also required to be noted that the complaint and the history given by the person before the doctor also support the say of the prosecution. Moreover, external as well as internal injuries sustained by the victim have also been proved by the doctor who performed post mortem on the dead body of the victim through his post mortem note Ex.39.

Prosecution has also been able to establish that the injuries sustained by the victim could be possible by way of muddamal weapon. It is also established that the deceased has received various injuries and he succumbed to the injuries due to three fractures suffered on the skull. Keeping in mind the way in which the incident has taken place, it appears to be a pre-plan wherein all the accused have gathered and assaulted simultaneously. Moreover, motive has also been established that one of the accused has demanded Rs.200/- from the victim but as he had no money, they had beaten him. Minor discrepancies or inconsistencies in the statements of witnesses are required to be ignored if they are deposing the same on material point. Here in this case, all the eye witnesses have deposed that the accused were having weapons in their hands and they assaulted the victim with those weapons.

25.From the above, we are of the opinion that the case against the appellants has been proved by the prosecution beyond reasonable doubt and hence, the impugned judgment and order of conviction and sentence passed by the court below is not required to be interfered with and the appeal deserves to be dismissed.

26.The appeal is hereby dismissed. The

appellant No.2-original accused No.2-Ibrahimbhai Isubhai Ganchi and the appellant No.3-original accused No.3-Tarmohmad Hussainbhai Sindhi are absconding as per the report of the Ahmedabad Central Jail authorities dated 13-6-2007 and hence, concerned Jail Authorities are directed to take necessary steps forthwith for procuring their custody.

(R.P.DHOLAKIA, J.) (H.N.DEVANI, J.)

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